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Hitting Criminals Where it Hurts: Organised Crime and the Erosion of Due Process

John Lea

Introduction

The last few decades have seen a general drift to a more authoritarian criminal justice system in the United Kingdom. One way to understand this drift is in terms of a shift along the continuum from a concern with the defence of due process further towards a preoccupation with effective crime control. The tension between these two goals is central to the working of criminal justice.¹ Due process is associated with concepts of justice, a fair trial and the rule of law. In particular it may be said to involve standards of proof meeting the criterion of *beyond reasonable doubt*, a duty of the prosecution to prove guilt to this standard, the defendant to be regarded as entirely innocent until this proof has been demonstrated and the defendants right to silence, not to participate in their own incrimination. The general orientation of due process is the concern to ensure that innocent defendants are not convicted.²

As regards the criminal justice system in England and Wales the 1980s were the last period of reform in which concerns of due process and rights of the accused were uppermost in the minds of legislators. Indeed the reforms of the mid-1980s involving the clear separation of police investigation from prosecution (a blurring unique to the English system)³ were driven by the revelation of major miscarriages of justice which took place during 1970s and early 1980s. The aim of these reforms was precisely to prevent too much blurring between the dynamics of police investigation on the one hand and legal proof and due process on the other.⁴

During the 1990s and into the present century the direction of reform of criminal justice significantly reversed. The yardstick of an effective criminal justice system has now become simply the control of crime. Emphasis has shifted from the rights of the suspect to guaranteeing that the guilty get punished. Changes since the beginning of the 1990s concerning reduction in the role of jury trial, disclosure of evidence, modification of the right to silence, as

¹ The classic statement of this tension, in the context of police work, is Herbert Packer *The Limits of the Criminal Sanction* (Stanford University Press, 1968).

² See for example A. Bradley and K. Ewing, *Constitutional and Administrative Law* (Longman, 12th ed, 1997).

³ This blurring is still the case in Ireland and the last official review, submitted in 1999, concluded that the present system was working well!

⁴ Thus the establishment of the Crown Prosecution Service in England and Wales by the 1985 *Prosecution of Offenders Act* following the report of the *Royal Commission on Criminal Procedure* in 1981 can be seen as driven by the need to prevent cases coming to court which were still in reality at the stage of police "hunches" rather than evidence really sufficient to secure convictions beyond reasonable doubt. The independent prosecutors were now to apply an "evidential sufficiency" test to police evidence prior to taking the case to court.

well as changes in police powers and organisation all point in the direction of tooling up the criminal justice system as an effective crime fighting machine.⁵

David Garland locates the social basis for these and other changes largely in the disenchantment of the middle classes with a *penal welfarism* that stressed the reintegration of offenders into society and the subsequent drift towards a more punitively oriented *crime complex*. This was due on the one hand to the failure of the criminal justice system to prevent high levels of crime becoming a permanent and normal feature of *late modern* society and on the other to changes to middle class lifestyles conducive to a growing sense of insecurity.⁶ While these are important factors it is also necessary to stress the influence of changes in the structure and organisation of crime itself. In particular the increasing focus on the interdiction of powerful organised crime is now a major driving force in the shift from due process to crime control.⁷ As I have argued elsewhere, it is possible to see the dependence of a criminal justice system, which both guarantees due process and at the same time is reasonably effective in controlling the level of crime, as historically associated with the predominance of the weak, socially marginalised offender. Such offenders are visible, rejected by the public as disruptive, unable to take steps restrict the flow of information from witnesses and public to the police sufficient to secure conviction while respecting the requirements of due process.⁸

Such a situation always was an ideal type. It is undermined in a variety of ways but in the case of modern organised economic crime by two characteristics. Firstly, some organised crime groups may be sufficiently powerful to be able to restrict the flow of information about their activities to the criminal justice agencies. This may be achieved through a mixture of bribery or intimidation of both the public and the police. Secondly, modern organised crime is increasingly characterised by a process of *structural normalisation* whereby criminal activities have become so intertwined with the legitimate world at the level both of structure and process as to severely hamper the identification and tracking of many aspects of criminal activity.⁹

These impact crucially on the flow of information about crime to the law enforcement agencies from the public. This is quite distinct from the fact that some sections of the public – such as users of illegal drugs – are customers of criminal services and naturally have no wish to compromise their sources of supply. In the context of the more general social and cultural changes associated with late modernity the criminal justice system is under political pressure to adopt measures designed to increase the flow of information leading to criminal convictions irrespective of the effect of such measures on human rights and due process.

⁵ See F. Belloni and J. Hodgson, *Criminal Injustice: An Evaluation of the Criminal Justice Process in Britain* (Macmillan, 1999).

⁶ See D. Garland *The Culture of Control* (Oxford University Press, 2001) especially chapter 6. Other writers have dealt with parallel themes. See Jock Young *The Exclusive Society: Social Exclusion, Crime and Difference in Late Modernity*. (Sage Publications, 1999) and John Lea *Crime and Modernity* (Sage Publications, 2002).

⁷ Increasingly this dynamic is being joined and even partially displaced by a preoccupation with international terrorism. While the two concerns interpenetrate at a number of levels considerations of space prevent a sustained focus on terrorism in this article.

⁸ See Lea, *Crime and Modernity*, pp. 167-8.

⁹ See Lea, *Crime and Modernity*, pp. 140 *et seq.*

Measures designed to overcome the capability of organised criminal groups to deploy intimidation and corruption aimed at obstructing the flow of information about their activities to law enforcement agencies may, but do not necessarily, compromise due process. Witness protection schemes may assist the flow of reliable information which can be presented in court and lead to conviction. On the other hand juries may question the reliability of the information provided by police informants or "supergrasses" drawn from the ranks of organised crime itself.

Structural normalisation poses more complex problems. The interpenetration of criminal and legitimate activity, increasing global mobility of personnel, goods, services and finance together with increasing flexibility of criminal networks and organisation poses major problems for traditional law enforcement methods. The result has been an attempt to suffocate organised crime by focusing on its end product: impeding the accumulation of assets. A major aspect of this concerns the laundering and rapid disposal of proceeds of criminal activity through global financial networks.¹⁰

Two responses by law enforcement are of particular importance. Firstly, the imposition of a duty of surveillance and reporting of "suspicious financial transactions" on an ever widening circle of banks, financial and commercial institutions. These do not in principle compromise due process in the courts though they may place severe burdens on employees of financial institutions and thereby undermine civil liberties.

A second response involves a frontal assault on due process. The task of gathering sufficient information to prove "beyond reasonable doubt" that certain assets are the proceeds of crime can be replaced or supplemented by reducing the standard of proof to that of the "balance of probabilities" generally deployed in civil litigation. Furthermore the burden of proof may be reversed such that it is up to defendants to show, on the balance of probabilities, that assets in their possession are not the proceeds of crime.¹¹ The structural normalisation of organised crime also poses problems at the level of membership and organisation. The interpenetration of criminal and legitimate activity results in blurred boundaries of membership of identifiable criminal groups and participation in criminal enterprise. A major aspect of this problem is the existence of organisational structures which enable the leaders and directors of criminal activities to remain at a distance from the direct commission of criminal offences even while directing them and relying on them to secure the accumulation of wealth.

Again, some of the new techniques being adopted by criminal justice systems raise due process issues. Standards of proof may be lowered by broadening concepts of criminal conspiracy to enable a wider circle of individuals to be regarded in law as participants in criminal enterprise. This is a

¹⁰ The discussion of money laundering techniques and their interdiction is a major area of work in itself. For a useful overview see M. Levi "Money Laundering and Its Regulation" *Annales of the American Academy of Political Science* (2002) 582; pp. 181-194.

¹¹ For an overview of such measures and a survey of their use in various jurisdictions see: N. Jayawickrama *et al* "Legal Provisions to Facilitate the Gathering of Evidence in Corruption Cases: Easing the Burden of Proof" *Forum on Crime and Society* 2 (2002); pp. 23-31; M. Levi, "Reversal of the Burden of Proof in Confiscation of the Proceeds of Crime: A Council of Europe Best Practice Survey." (European Committee on Crime Problems, 2000).

particular issue with the displacement of older tight-knit criminal *families* by looser, more flexible networking groups.¹²

Standards of proof may be further compromised by allowing courts to deploy notions of *criminal lifestyle* which, once established, enable inferences as to the origin of a defendant's assets to be made. Such inferences may fall well below the criminal standard of proof beyond reasonable doubt and the burden of proof may also be reversed such that it lies with the defendant to show that assets are legitimate income.

Such developments depend for their legitimisation on the more general social changes outlined by Garland and others. The self-consciousness of government and law enforcement agencies may well be "trust us: such new powers will only be used judiciously" and "if you're innocent you've nothing to fear." Meanwhile the abandonment of a concern with penal welfarism and a rising fear of crime creates a popular basis for compromise of due process in the interests of a "war on organised crime." The remainder of this article will focus mainly on two of the developments discussed briefly above, namely those of criminal assets and membership of criminal enterprise. Recent UK legislation will be discussed from the standpoint of the erosion of due process. Finally some general conclusions will be arrived at concerning the emerging configurations criminal justice adapted its new tasks of "hitting criminals where it hurts."

Criminal Assets

Recent UK government thinking on tackling organised crime starts from the study by the Performance and Innovation Unit of the Cabinet Office (PIU) published in 2000. This identified a developing consensus that the techniques available to law enforcement to follow the criminal money trail were falling behind the resources available to criminals to help them conceal their illegal gains.¹³ This conclusion was based on the perceived small amounts realised against confiscation orders by the courts following criminal conviction compared to estimates of "known" criminal assets which, it is assumed, are the proceeds of and funds available for reinvestment in criminal activity. The report revealed that in the five years to 2000 court orders for the confiscation of assets following criminal conviction had only been raised in only 20 percent of drugs cases where they were available and in 0.3 percent of other cases.¹⁴ The PIU report made numerous recommendations of which the most important have been those concerning "criminal lifestyle" as a basis for asset confiscation following criminal conviction and the extension of powers of civil recovery. Both these principles form a key part of the Proceeds of Crime Act 2002 (POCA) which became active in February 2003.

¹² For a general discussion of such changes in criminal organisation see D. Hobbs, "Professional and Organised Crime in Britain" in *The Oxford Handbook of Criminology*, eds M. Maguire et al. (Oxford University Press 1994); D. Carter "International Organized Crime: Emerging Trends in Entrepreneurial Crime" in *Understanding Organized Crime in Global Perspective* eds. P. Ryan and G. Rush (Sage Publications 1997).

¹³ Performance and Innovation Unit, *Recovering the Proceeds of Crime* (Cabinet Office, 2000) para 2.4

¹⁴ Performance and Innovation Unit, *Recovering the Proceeds of Crime*, para 1.6.

Criminal lifestyle

The key principle hitherto embodied in UK drugs trafficking legislation, notably the Proceeds of Crime Act 1995 is the assumption that once a criminal conviction is secured for a drugs trafficking offence then the court is entitled to assume, on the civil standard of the balance of probabilities that *all* assets acquired, or expenditures and transfers made, by the offender during the previous six years are proceeds of drug trafficking. While confiscation upon conviction is possible in non-drug offences, only for the latter was the assumption concerning all assets applicable. The PIU report recommended extending the drug trafficking confiscation laws so that they apply to all types of offence. This reflects the practice of drugs criminals to diversify into non-drugs crime. It will enable assumptions to be made about the origins of defendants' assets in all cases, and not just drugs ones. It will remove the ability of defendants to plead guilty to non-drugs offences in order to avoid the harsher provisions of drugs laws and thereby preserve their assets.¹⁵

POCA (Section 75) achieves this aim by widening out drugs trafficking into a more general concept of *criminal lifestyle*. If the offender can be shown to have such a lifestyle then all assets, acquired over the previous 6 years are assumed to be proceeds of *general criminal conduct* and liable to confiscation. The burden of proof is on the defendant to show the converse. If no such lifestyle can be established then only the assets derivable from the particular offence are liable to confiscation.

Drug trafficking is fairly precise but a general criminal lifestyle is much vaguer. Schedule 2 of POCA lists various offences that automatically indicate such a lifestyle. These include drugs, people trafficking, money laundering, terrorism and some others. But there are more general ways of acquiring a criminal lifestyle. Section 75(2)(c) specifies an offence committed over a period of at least six months from which the defendant has benefited while Section 75(2)(b) specifies an offence which "constitutes conduct forming part of a course of criminal activity." The latter is defined in Section 75(3) as conduct from which the defendant has benefited and (a) because a minimum of three other offences from which the defendant has benefited are covered in the same proceedings or (b) because there have been two previous convictions for offences from which the defendant has benefited on separate occasions during the last six years. Finally, Section 75(4) defines benefit as not less than £5,000.

These developments represent a considerable widening of the scope for criminal confiscation. It is important to understand the general process at work here. Knowing that someone has previous convictions and a criminal lifestyle, and is therefore likely to be making money out of crime, might be thought a legitimate component of detectives' knowledge of the particular criminal underworld with they are concerned. Such knowledge would function as an important factor in focusing further enquiries, surveillance and targeting of suspects with the aim of linking assets with particular crimes as a component of the evidence which secures a conviction to the criminal standard of proof. Now, it seems, the detectives' hunch is sufficient and it is for the defendant to disprove it.

¹⁵ Performance and Innovation Unit, *Recovering the Proceeds of Crime*, para 1.32.

Civil recovery

A similar dynamic is evident in area of civil recovery. The PIU report recommended an extension of civil recovery powers hitherto restricted to the seizure at borders of cash thought, on the balance of probabilities, to be involved in drugs trafficking. The report recommended an extension of civil recovery (known in some other English speaking jurisdictions as civil forfeiture) to enable assets, allegedly the proceeds of crime, to be seized *irrespective of conviction in the criminal courts*. Investigators would assess the suspect's legitimate income as declared for tax purposes and would then argue in court that income beyond this was, on the balance of probabilities, proceeds of crime. It would then be for the suspect to rebut these charges and show that such income was *not* the proceeds of crime nor intended for use in criminal activity. Such powers are used in a number of jurisdictions, particularly in corruption cases.¹⁶

Such provisions were included in Part 5 of POCA. The Act also established the Assets Recovery Agency (ARA) to assist law enforcement investigations and to act in the area of civil recovery applications.¹⁷ A general influence here was the Irish model. The Criminal Assets Bureau (CAB) with civil recovery powers was established in Ireland under the 1996 Proceeds of Crime Act which followed the assassination, by organised crime, of journalist Veronica Guerin. Other influences were Australia and the United States. In the latter jurisdiction civil forfeiture, expanded as part of the "war on drugs" beginning in the 1970s, has come in for widespread criticism for the ease with which the state can seize assets allegedly the proceeds of, or involved in, criminal activity.¹⁸ The Civil Asset Forfeiture Reform Act of 2000 to some extent reverses the trend by placing a greater burden of proof on the state to show that assets are in fact proceeds of crime or used in criminal activity.¹⁹

Meanwhile a visit to the ARA website is instructive. On the front page of the site the Director, Jane Earl, cheerfully announces the reversal of the burden of proof:

If you have a large house and five places in the Caribbean, with no visible means of support, no rich aunts who have recently died leaving the odd five million and no successful lottery tickets, it won't do to say that someone gave you the money.²⁰

If this sounds like a conversation in a police interview room drawn from an episode of *Inspector Morse* that is precisely because it illustrates one of the

¹⁶ See Jayawickrama *et al* "Legal Provisions to Facilitate the Gathering of Evidence in Corruption Cases: Easing the Burden of Proof," pp. 23-31.

¹⁷ The ARA operates in England and Wales and Northern Ireland. In Scotland these functions are vested in a Civil Recovery Unit (CRU) which is an arm of the Crown Office and Procurator Fiscal Service under the Lord Advocate.

¹⁸ See S. Meeker-Lowry, "Asset Forfeiture" *Z Magazine* (January 1996); E. Blumenson and E. Nilsen, "Policing for Profit: The Drug War's Hidden Economic Agenda" *University of Chicago Law Review* 65 (1998): pp. 35-114.

¹⁹ See P. Loughlin, "Does the Civil Asset Forfeiture Reform Act of 2000 Bring a Modicum of Sanity to the Federal Civil Forfeiture System?" *The Mallet Street Gazette* (June 25, 2004)

²⁰ <http://www.assetsrecovery.gov.uk/> (accessed 2/7/2004).

main consequences of a reliance on civil recovery, as with that of criminal lifestyle: the reduction of legal processes of proof to the dynamics of police investigation. If someone cannot give a plausible account of the origin of their assets then this might convince the investigators that they are on to something and spur them on to probe more deeply until they come up with enough evidence to secure a criminal conviction. With civil recovery this is no longer necessary. The detective's hunch is sufficient. It can be argued that on the balance of probabilities the assets are the proceeds of crime because there is no other acceptable explanation, at this point in time, of their legitimate origin. It is then up to the defendant, irrespective of conviction in the criminal court, to do the work and demonstrate the legitimate origin of the assets.

It might be argued that as a civil procedure, without the requirement of a criminal conviction, there is no threat of punishment and therefore the lower standard and reversed burden of proof is acceptable. Analogous powers are wielded, after all, by the Inland Revenue. But, as civil libertarians have pointed out, this is disingenuous when what is really going on is, at the end of the day, a criminal process. *Liberty*, the main UK civil liberties organisation, commenting on the draft Bill for POCA put it very bluntly indeed:

Undoubtedly the aim of the draft bill is to create a procedure where suspected criminality can be punished without the normal due process protections enjoyed by a defendant in criminal proceedings. While clearly there are certain aspects of civil proceedings which differ from criminal, it is our opinion that a defendant should still enjoy critical safeguards given the criminal nature of the allegations and the serious financial consequences of any order.²¹

Effective targeting?

It should not be thought that the target of such measures as contained in POCA is solely the global crime networks of which we hear so much at present. These networks impact powerfully in many poor communities demoralised and fragmented by years of economic decay. Indeed the original PIU report was very explicit that the even dealt with ad hoc property crime:

there is substantial evidence of more organised gangs and individuals who occupy key nodes of activity – fences, major drugs suppliers, criminal financiers – and who facilitate the wider (and often more disorganised) criminal markets and networks. It is against these criminal market facilitators that asset removal is likely to contribute most by way of disruption . . . (and) . . . although the majority of burglaries are committed by offenders with few assets, they dispose of the stolen property through a limited number of often wealthy individuals.²²

²¹ C. Montgomery, M. Rider and D. Friedman, *Proceeds of Crime Bill, Opinion of Counsel, Part V of the draft Bill, Civil Confiscation* (Liberty, May 2001), para 5.1

²² Performance and Innovation Unit, *Recovering the Proceeds of Crime*, paras 3.12 and 3.13

These were to be as much a target as international traders and money launderers. Although ARA civil recovery actions are still in their infancy the results so far have been against small and middle level criminal activities. While large amounts have been subject of ongoing investigations, only fairly small amounts have actually been confiscated under civil recovery powers. In England and Wales to date (July 2004) ARA has secured two civil recovery orders for asset confiscation where no criminal conviction was involved. In May 2004 the princely sum of £16,049 was acquired and then in July a further £32,000.²³ The Scottish CRU has fared rather better with £24,000 in January 2004 and £165,000 in June 2004.²⁴

A focus on small and middle level criminal entrepreneurs operating in local communities can have two consequences. First it can gradually displace a concentration on major co-ordinators. The small fry are simply easier to catch. This has been a criticism levied at the Irish CAB.²⁵ Secondly, as part of the same dynamic, the deployment of criminal lifestyle and civil recovery against small scale local criminals is vulnerable to a process of net widening in which all sorts of trivial offenders are caught up. The notion of criminal lifestyle in particular was identified by *Liberty* as vulnerable to this effect:

the scheme proposed by the government applies to relatively trivial individual thieves, burglars, fraudsters and robbers who notch up sufficient qualifying offences as well as persons involved in serious, long term organized crime whose activities may indeed threaten the social and economic well-being of a significant section of society.²⁶

It might be argued that even a focus on lower level local criminals with small assets will, besides removing criminal role models from local communities, demonstrate that crime does not pay, and act as a deterrent by reducing the economic returns to crime. Recent government publications have been saturated with this approach to the criminal as rational economic calculator.²⁷ In many poor communities, however, it will take more than a few asset seizures to achieve anything beyond a short term reduction in crime. Many in such areas are driven to criminal enterprise by a culture of drugs and short term hedonism as a way of adapting to poverty and lack of worthwhile legitimate career opportunities. In such circumstances the confiscation of assets may, as Tom Naylor points out, "simply force them to repeat the acts that generated the money, since career criminals tend not to have a particularly wide range of career alternatives."²⁸

²³ Assets Recovery Agency, *Proceeds of Crime Update* (27 May 2004, 12 July 2004).

²⁴ See W. Tinning, "Largest cash grab under new crime law" *The Herald* (June 16, 2004).

²⁵ Independent Dail member Tony Gregory, a leading anti-drugs campaigner, claimed the CAB was failing to curb the activities of major drug dealers because it had been sidetracked into tackling lower-league criminals. See G. Darroch, "Fear that crime cash seizure unit is failing to net big fish" *The Sunday Tribune*, (January 11th, 2004).

²⁶ Montgomery, Rider, Friedman, *Proceeds of Crime Bill, Opinion of Counsel, Part II of the draft Bill, Criminal Confiscation* (Liberty, May 2001), para 4.3.5

²⁷ See for example Performance and Innovation Unit, *Recovering the Proceeds of Crime*, paras 3.2 and 3.18

²⁸ R.T. Naylor, "Washout: A Critique of Follow-The-Money Methods in Crime Control Policy," *Crime, Law & Social Change* 32(1999): p. 18.

Meanwhile, at the other end of the scale those "Mr Bigs" who have made serious money are deploying the most advanced and sophisticated money laundering techniques to place their assets beyond reach. They are the least likely to be caught by either the new or old techniques. There is some evidence that sophisticated criminals are adapting their activities to the new regime by abandoning flamboyant lifestyles and, taking advantage of the increasing global interconnections of criminal markets, relocating assets abroad at the earliest opportunity.²⁹ At the same time court cases in which substantial criminal enterprises have left small locatable assets suggest that "the more sophisticated criminal is now wise to the dangers of confiscation and that those caught with assets to confiscate are not the 'Mr Bigs' but those at the lower levels of criminal enterprise."³⁰

Criminal Organisation

A second focus of recent UK government thinking is more directly concerned with the managers and directors of organised crime operations. An article in *The Economist* in 2001 quoted the then director-general of the National Criminal Intelligence Service (NCIS), John Abbott, as claiming that the number of top criminals had risen by a third every year for the previous five years. There were now a group of around 150 *core nominals* surrounded by an estimated 750 lieutenants directing in the region of 1,000 organised criminal groups are operating in the UK.³¹ These directors and managers administer large assets derived from criminal enterprise while avoiding actual criminal conduct themselves.

This feature was heavily characteristic of the classic Italian-American *Mafia* organisation and led, in the United States, to the Organized Crime Control Act of 1970 which established a set of statutes relating to *Racketeer Influenced and Corrupt Organization*, popularly known as RICO. This legislation is a modified form of conspiracy law in which a criminal or a civil conviction can be established by showing the individual was a *member* of an organisation or enterprise which engages in a *pattern of racketeering activity* irrespective whether that individual has undertaken criminal acts. RICO came into widespread use during the 1980s when it was credited with dealing the death blow to the *Godfathers*, heads of Italian-American crime families who themselves kept at a distance from actual criminality. Central to RICO is the admissibility of telephone intercept evidence in court. Such evidence is crucial in showing, through evidence of conversations and communications that the individual was a member of, or directing, criminal activities even though keeping a distance from personal involvement in crime. This type of evidence is not presently admissible in UK Courts, and this was confirmed in the recent Regulation of Investigatory Powers Act 2000 (RIPA) which in other respects extended government powers of surveillance over electronic communications.

²⁹ See T. Thompson, "Flash Harry turns frugal," *The Observer* (April 11, 2004).

³⁰ J. Summers, "We're innocent until proved guilty . . . Or until our assets are seized," *The Times* (November 25, 2003).

³¹ "The Untouchables" *The Economist* (April, 21st 2001).

British government thinking is that some form of RICO-type powers would assist in tackling top criminals. In 2002 Mike Levi and Alaster Smith prepared a preliminary document which, among other things, showed the specificity of RICO and similar laws in continental Europe to the problem of dealing with traditional organised crime of the mafia type. Against the newer looser criminal networks with shifting memberships and temporary alliances such legislation was likely to be less effective.³²

[D]ealing with a Mafia-type or even Hells Angels-type association with known or knowable membership and admission rites is one thing; dealing with flatter and less formal networks is another.³³

They continued:

It is easy to see how the RICO or the Dutch legislation might be applied against some past English crime groups, such as the Krays and Richardsons in the 1960s. There are at least a few such instances in current National Crime Squad (NCS) and Customs caseloads. However, there has to be a plausible link demonstrable to the court between the defendant and the group, and the mere possession of unaccounted wealth and mixing in clubland circles is unlikely to be sufficient (though it might be sufficient for civil asset recovery proceedings or taxation demands).³⁴

The issue is, therefore, as *The Economist* summarised it up with customary brevity, that "Godfathers have given way to networkers."³⁵ The government response to these considerations and associated matters is embodied in the White Paper *One Step Ahead* issued in March 2004.³⁶ The first recommendation, concerning the amalgamation of the police National Crime Squad, NCIS and the intelligence arms of Customs and Excise and the Home Office immigration department into a new Serious Organised Crime Agency (SOCA) is already in the process of enactment. Alongside SOCA will be a body of specialist prosecutors with powers akin to those of the Serious Fraud Office as regards the compelling of witness to answer questions and produce documents.³⁷

Spreading the net of conspiracy

But from the standpoint of this discussion the most important conclusion of the White Paper appears to be that a more flexible type of organised crime requires

³² See note 11 above.

³³ M. Levi and A. Smith, *A Comparative Analysis of Organised Crime Conspiracy Legislation and Practice and Their Relevance to England and Wales* (Home Office, 2002) p. 3.

³⁴ Levi and Smith, *A Comparative Analysis of Organised Crime Conspiracy Legislation and Practice and Their Relevance to England and Wales*, 12.

³⁵ "Can Britain do to its gangsters what America did to the Mafia?" *The Economist* (April 1st, 2004).

³⁶ *One Step Ahead: A 21st Century Strategy to Defeat Organised Criminals* (Home Office, Cm6167, 2004).

³⁷ *One Step Ahead: A 21st Century Strategy to Defeat Organised Criminals*, 42-3.

a more flexible concept of conspiracy than even that contained in RICO. The aim is no longer to show that individuals who may escape direct involvement in criminal acts are in fact *full members* of a criminal group that engages in such acts. This can be covered, as is normal in the UK, by traditional conspiracy and drug trafficking offences. What is now needed is a way of dealing with looser forms of organisation. For this purpose *One Step Ahead* suggests a new offence of *belonging to an organized crime group*. A characteristic of this offence, it is suggested, should be a relaxation of *mens rea* as a requirement for liability as a secondary party.

The sophistication and breadth of much organized crime activity means it is often surrounded by a wider circle of people with some knowledge of the group's activities . . . We are particularly interested in the area of secondary participation, where a defendant may be aware he or she is engaging in organized crime, but can argue they are unaware of the precise nature of the criminality.⁸

Secondary participation addresses a feature of the structural normalisation of modern organised crime. Traditional Mafia-type organisations certainly had corrupt lawyers, police officers, politicians and money launderers in their pay. However, the links were transparent because a clearly defined criminal organisation with a clear – if clandestine – membership lay behind them. In modern network based crime individuals may join together for particular projects for relatively short periods, while particular services such as money laundering, warehousing and transporting illegal goods or clandestine immigrants are purchased as the need arises from people who spend most of their time in legal activities. With such loose and flexible connections, traditional notions of conspiracy, it can be argued, are stretched to breaking point.

However, one recommendation by the White Paper that *is* taken from RICO and indeed from other jurisdictions, is that telephone intercepts be made admissible in court. Indeed, it can be argued that network crime is *more* dependent on telephone and electronic communication than traditional mafia activities where key figures met regularly and interacted in numerous ways. From such a standpoint RIPA was irrational in maintaining the status quo as regards telephone intercepts. But civil liberties groups have picked up this issue and turned it back as a criticism of the White Paper.

Liberty welcomes the proposal that phone intercepts be made admissible as “a step being likely to produce high quality evidence of involvement in criminal agreements resulting in convictions.”⁹ However the proposed extension of conspiracy law involved in the proposed offence of belonging to an organised crime group “runs the risk of reducing the *requirement* for evidence and introducing non-specific concepts of generalised criminality into UK law.” This would be both difficult to prove and difficult to mount a defence against. Furthermore the proposal is, as with other concepts such as criminal lifestyle

⁸ *One Step Ahead: A 21st Century Strategy to Defeat Organised Criminal*, p. 41.

⁹ ‘One Step Ahead’ *Liberty’s response to the Home Office Consultation on Organised Crime* (Liberty, July 2004), p. 4.

discussed above, a recipe for simply reducing the amount of detective work necessary to secure a conviction. "If there is insufficient evidence of involvement in serious crime the solution . . . is to obtain the evidence on which a legitimate prosecution may be brought."⁴⁰

The all-party legal and human rights group *Justice* argues in a similar vein that existing conspiracy law, if properly used, is a potentially very wide offence with its focus on agreement to commit an offence rather than its actual commission.⁴¹ It welcomes the proposed admissibility of telephone intercepts as part of pro-active, intelligence-led, policing that is necessary in the interdiction of organised crime.⁴² *Justice* makes the point that if the ban on admissibility of telephone intercepts is lifted, then the task of gathering evidence leading to normal conspiracy convictions against organised crime is made easier.⁴³ Many other matters of legal technicality are of course aired in this response but it is clear that the responses to the White Paper have underlined the drift that we identified earlier in this discussion. Namely, the constant tendency for a weakening of due process, and indeed wider civil liberties, in the interests of reducing the amount of evidence gathering by law enforcement agencies necessary to put offenders behind bars.

Civil society as a police agency

Not only is the amount of evidence gathering by law enforcement agencies necessary to secure convictions or seize assets reduced, but an increasing role in gathering such evidence is being made to fall on the shoulders of ordinary civilians. An important feature of POCA is a further strengthening of measures to turn accountants, bank employees, estate agents, solicitors and similar occupations into auxiliary detectives. This is a response to an aspect of the structural normalisation of organised crime. While gangsters have always needed some form of money laundering the rapid transformation of proceeds of crime into legitimate bank deposits, real estate and other legal assets, through a variety of channels and often employing specialists who may be otherwise respectable members of the financial and legal professions is now seen as a major problem.

In the UK the "death of bank secrecy" as regards client confidentiality dates from the beginning of the 1980s.⁴⁴ Legislation has continuously widened the responsibilities of a variety of financial and legal institutions to report "suspicious transactions." POCA now applies criminal sanction to such activities. Section 330(2)(b) introduces a negligence test which makes failure to disclose information about money laundering a criminal offence if the person concerned has "reasonable grounds" for knowing or suspecting that such activity is

⁴⁰ 'One Step Ahead' Liberty's response to the Home Office consultation on Organised Crime, p. 5.

⁴¹ Response to White Paper 'One Step Ahead: a 21st Century Strategy to Defeat Organised Crime' (Justice, July 2004), p. 3.

⁴² Response to White Paper 'One Step Ahead: a 21st Century Strategy to Defeat Organised Crime', p. 6.

⁴³ Response to White Paper 'One Step Ahead: a 21st Century Strategy to Defeat Organised Crime', p. 3.

⁴⁴ See M. Levi, "Regulating Money Laundering: the Death of Bank Secrecy in the UK," *British Journal of Criminology* 31 (1991): pp. 109-125.

occurring. Such a duty, and the threat underlying it, may well be seen as an unacceptable compromise of civil liberties particularly where the task in hand, identification of suspicious activity in relation to money laundering, is beyond the normally required skills of the employee even in a bank. *One Step Ahead* proposes further modifications, along the lines of giving SOCA powers akin to those of the Serious Fraud Office and the Financial Services Authority to compel individuals to give evidence and produce documents.⁴⁵

Tom Naylor points out the inherent difficulty, not to mention strained relations between private financial institutions and clients, of identifying suspicious transactions where, unlike with counterfeit currency or forged cheques, the illegal origins of the funds are not evident. He points out furthermore the fact that new technological developments in banking are enabling such regulatory apparatus to be circumnavigated.

The advent of electronic purses with peer-to-peer transfer, and the propensity for people to enter and leave countries, not with cash and travellers' cheques, but with debit cards, threatens to make the reporting apparatus now being carefully put in place, largely irrelevant.⁴⁶

A second problem is the massive increase in the flow of material to the authorities. There is a clear distinction to be made between information about crime and low quality useless information which will just clog up the works and consume time and resources. It should be obvious that the combination of increasing difficulty of identifying finance of criminal origins with increasing legal compulsion to do so, is a recipe for just such a flood of useless information. Already, under previous legislation, suspicious transaction reports rose from 18,408 in 2000 to 60,000 in 2002. Since POCA came into force this tendency has markedly accelerated. By March 2004 reports to NCIS were running at the rate of 100 a day.⁴⁷

Conclusion: the rise of the security culture

A regime in which courts were entitled to infer what previously had to be established by further police work and in which large numbers of people were constrained, under pain of prosecution, to report suspicious activities that they could only with great difficulty, if at all, identify might seem like something from the Middle Ages. The risk in the long term is precisely what might be called a *re-medievalisation* of criminal justice. Michel Foucault described the criminal justice system of pre-eighteenth century Europe in the following terms:

It is as if investigation and punishment had become mixed . . . The different pieces of evidence did not constitute so many neutral elements, until such time as they could be gathered together into a single body of evidence that would bring the final certainty of guilt . . . Guilt did not

⁴⁵ See note 37 above.

⁴⁶ See R.T. Naylor, *Economic and Organised Crime: Challenges for Criminal Justice*, (Canadian Department of Justice, 2000), pp. 29.

⁴⁷ P. Grant, "NCIS flooded by accountant reports" *Accountancy Age*, 25th March 2004, (www.accountancyage.com/News/1136621), accessed 2/8/2004.

begin when all the evidence was gathered to together: piece by piece, it was constituted by each of the elements that made it possible to recognise a guilty person . . . slight evidence of a serious crime marked someone as slightly criminal. In short, penal demonstration did not obey a dualistic system: true or false; but a principle of continuous gradation; a degree reached in the demonstration already formed a degree of guilt and consequently involved a degree of punishment.¹⁸

The lowering of the standard and reversal of the burden of proof, together with general concepts of criminal lifestyle and – if enacted – weakening of the requirements of conspiracy, generate just such effects. Guilt becomes *de facto* established at what would previously have been a particular stage in investigation: having no obvious explanation for the possession of assets, having been previously engaged in similar actions, having had some contact with others who are known or suspected to be involved in crime. Not only the rights of the accused are diluted by such developments but a more general dilution of civil liberties affects wider sections of the population who are constrained, under threat of criminal prosecution themselves, to act as unpaid auxiliaries for the law enforcement agencies. We find ourselves inhabiting a security culture – an aspect of Garland's crime complex – which dictates the compromise of due process and civil liberties as an "obvious necessity" in the war against organised crime and terrorism. Criminal justice *per se* becomes redefined as police work rather than the latter as something that contributes to justice.

But what are the alternatives? Quite apart from a little more focus on being "tough on the causes of organised crime" such as the global poverty and inequality which foster criminal activities as the only viable career choice in many parts of the world, including parts of the UK, criminal justice systems and governments can respond to the problem without dispensing with due process and civil liberties. Indeed some useful measures are contained both in POCA and in the White Paper.

It is possible to take steps to increase the flow of reliable information about organised crime without watering down the law of conspiracy and the deploying vague concepts of criminal lifestyle. The White Paper argues, as we have already noted, for the admissibility of telephone intercepts. Also it is characteristic of organised crime that the most important sources of information about its activities are its own participants. The "supergrass" informant has gone into decline in the UK and the White Paper recognises that part of the reason for this is juries' suspicion of the character of co-operating defendants.¹⁹ The White Paper suggests a more formalised system of binding agreements between informant and prosecution in which a determinate sentence reduction will be agreed in advance in return for particular information given in testimony. There is no reason why the evidence of a supergrass, like any other variety of whistleblower, should not contribute to a legal proof of criminality beyond reasonable doubt. That is not where the problem lies. It lies rather with watered down concepts of conspiracy, vague notions of criminal lifestyle, and downgrading and reversing the burden of proof as regards the origin of assets.

¹⁸ M. Foucault, *Discipline and Punish* (Allen Lane, 1977), pp. 41–2.

¹⁹ *One Step Ahead: A 21st Century Strategy to Defeat Organised Criminals*, p. 48.

As regards assets an alternative route to the reliance on civil recovery has been argued for time and again. Indeed there are elements of it in the powers conferred on the ARA by POCA. The first step is to admit with Tom Naylor that "[i]n the hands of law enforcement, the modern policy of attacking the proceeds of crime by finding, freezing and forfeiting laundered money has been one great washout."⁵⁰ The most obvious illustration of this is the fact that in the United States even the most severe civil forfeiture regime of any jurisdiction has had no noticeable impact on the growth of the drugs economy. It has long been recognised that the general effect of interdiction is simply the elimination of the inefficient players.⁵¹

The second step is to grasp the consequences of the structural normalisation of organised crime: to face up to the fact that all too often it is not possible to disaggregate criminal and legal activities. This is the rational kernel in a focus on outcomes, on the proceeds of activity. But this means having an open mind on the origin of assets. Instead of asking "are these assets the proceeds of crime?" and interfering with due process to prove that they are, the question should be simply: "is this unearned, untaxed, income?" Thus Naylor advocates the tax system as the main mechanism for dealing with criminal assets like any other form of unearned income. "It is better than the various provisions for criminal asset forfeiture; and it can accomplish most of what civil forfeiture procedures do without the same adverse effects on due process and civil liberties."⁵² This is partly recognised already. POCA empowers the ARA to apply for tax assessments. In the period up to July 2004 it had issued tax assessments in eight cases totalling almost £900,000.⁵³ A feature of tax assessments is that there is an established tradition of reverse burden of proof which does not make inroads into due process in the criminal courts. Criminal enterprises will try to hide their assets from the Inland Revenue but in this they are acting no differently than a vast number of legal enterprises.

Nevertheless taxation is still seen very much as the measure of last resort as regards criminal asset confiscation. Elevating it to the measure of first resort requires the dismantling of the security culture and the crime complex of which it is a part. As far as finance is concerned, dealing with criminal assets is little different from dealing with any other variety of tax evasion. This was, after all, how they got Al Capone.

⁵⁰ R.T. Naylor *The Wages of Crime: Black Markets, Illegal Finance, and the Underworld Economy* (Cornell University Press, 2002), p. 286.

⁵¹ See N. Dorn and N. South, *Traffickers: Drug Markets and Law Enforcement* (Routledge, 1991).

⁵² See Naylor, *Economic and Organised Crime: Challenges for Criminal Justice*, p. 30.

⁵³ Assets Recovery Agency, *Press Release* (22nd July 2004).